No. 452

IN THE

Supreme Court of the United States

October Term, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

CHARLES T. FISHER, EDWARD F. FISHER, AND LEO M. BUTZEL, EXECUTORS OF THE ESTATE OF FRED J. FISHER, AND BURTHA M. FISHER, RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CITATIONS

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is filed by Burtha M. Fisher and the executors of the Estate of Fred J. Fisher in opposition to the Petition for a Writ of Certiorari which has been filed in this Court by the Commissioner of Internal Revenue. The parties will hereinafter be referred to as "Commissioner" and "Fisher."

INTRODUCTORY STATEMENT

At the outset we believe that the petition is so designed as to tend to mislead this Court, and we feel it necessary to comment on its misleading character.

It is misleading in that it seeks to convey to this Court the impression that the Court below refused to follow the *Wheeler* case, in that it refused to give effect to this Court's holding that the regulations under prior Revenue Acts were valid in requiring the use of transferors' cost in computing "earnings and profits." This is contrary to the facts and the record in this case. As will hereinafter be shown, the lower Court gave full recognition to this Court's decision in the *Wheeler* case, but also held that neither the regulation under the 1934 Act nor the rule prescribed in Section 501 (a) of the Second Revenue Act of 1940 were applicable in determining the tax liability of Fisher for the year before the Court, because of the pendency of this case before the Board of Tax Appeals on September 20, 1940.

The petition is misleading in the following respects:

(1) It states as the question presented that of whether the decision of the Court below conflicts with the decision of this Court in *Commissioner v. Wheeler*.

(2) In advising this Court of action on the case by the Court of Appeals it states at page 5:

> "On review, the Circuit Court of Appeals issued an opinion on March 26, 1945, holding that the Commissioner's regulations were invalid if con-

strued as requiring that earnings and profits be computed on the transferors' basis (Appendix B, infra, pp. 25-32). On May 7, 1945, the Circuit Court of Appeals granted the Commissioner's petition for a rehearing (R. 160). On June 25, 1945, the Circuit Court of Appeals issued a decision which amended its former opinion but which adhered to its previous disposition of the case (R. 160-161)."

The impression that the petition seeks to create is that the Court of Appeals in its Order of June 25, 1945 adhered to its former holding that the regulations under the 1934 Act were invalid.

(3) Included as a part of the petition (Appendix B, pp. 25-32) there is set out not the final opinion of the Court below, which the Commissioner seeks to have reviewed, but the earlier opinion of March 26, 1945. This opinion was amended by the Court's Order of June 25, 1945, the amendment giving full recognition to this Court's decision in the *Wheeler* case.

For the convenience of the Court there is printed in the Appendix hereto, pp. 19 to 24, the full text of the final opinion of the Court of Appeals.

Correctly stated, the history of this case below is as follows. In The Tax Court Fisher urged the correctness of the following propositions:

(1) that under the 1934 Act corporate cost was the proper basis for computing earnings and profits, and

(2) that the rule requiring the use of transferors' cost could not be applied to this case by reason of the

limitation provision in Section 501 (c) of the Second Revenue Act of 1940, providing that "nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940,[1] was pending before, or was theretofore determined by the Board of Tax Appeals, or any court of the United States."

The Tax Court decided in favor of Fisher on both issues. The Court below in its opinion of March 26, 1945, rendered on the same date as the opinion of this Court in the *Wheeler* case, affirmed The Tax Court, holding that its decision was correct on both issues.

Thereafter the Commissioner filed a Petition for Rehearing (R. 155-159), alleging that the opinion of March 26, 1945 was in conflict with this Court's decision in the *Wheeler* case. The Court ordered an oral argument on the Petition for Rehearing (R. 160), and thereafter, on June 25, 1945, entered an Order amending its opinion of March 26, 1945 (R. 160-161). The amendment struck from the earlier opinion that portion of it which was in conflict with this Court's decision in the *Wheeler* case. The orginal opinion of March 26, 1945 contained the following language, which was not stricken by the Court's Order:

> "The statute which governs this situation was first enacted in 1940 and its material portions are printed in the margin. This section in effect provides that corporate earnings and profits on the

[1] As added by the Senate the wording was "*now* pending before." In conference the date of "*September 20, 1940*" was substituted. The Bill was passed by the Senate on September 19, 1940 (86th Cong. Record, Part 11, p. 12352).

sale of assets of the corporation are to be computed in the year when recognized in the same manner as taxable gains are calculated. But the statute also provides that the amendments made by the section shall not affect the tax liability of any transferor (taxpayer)[2] for any year which on September 20, 1940, was pending before or was theretofore determined by the Board of Tax Appeals or any court of the United States. The petition in this case was filed September 6, 1940, and therefore the proceeding is not governed by the amendments of 1940."

The Order of June 25, 1945 inserted immediately after the above quoted language the following:

"In this respect the case is sharply differentiated from *Commissioner v. Wheeler et al., Extrs.*, U.S. ....., decided March 26, 1945, which held valid and applicable Treasury Regulations 101, Art. 115-3, embodying the provisions of the 1940 amendment as to the determination of earnings and profits of a corporation for dividend purposes. Relying upon the cited case, the Commissioner contends that Regulations 86, Art. 115-1, a predecessor of Art. 115-3, requires reversal of the decision of the Tax Court. We think that Art. 115-1 does not govern here, for Treasury Decision No. 5024, 1940-2, Cum. Bull. 110, declares that while the rules stated in the regulations are applicable to cases which were pending before the Board of Tax Appeals on September 20, 1940, the limitation of §§ 501 (c) affects the tax liability for the specific year or years actually so pending on or determined prior to September 20, 1940. This decision aplies the saving clause of §§ 501 (c) to cases governed

[2] It seems apparent that the Court intended to use here the word "taxpayer."

> by Art. 115-1. As a contemporaneous interpretation of the meaning of the regulations by those who are appointed to carry out its provisions, Treasury Decision No. 5024 has great weight and is entitled to respect. *Augustus v. Commissioner*, 118 Fed. (2) 38 (C.C.A. 6), ceritorari denied, 313 U. S. 585. Cf. *Bowles Admr. v. Seminole Rock & Sand Co.*, ... U. S. ....., decided June 4, 1945."

It thus becomes apparent that the Court below gave full recognition to this Court's decision in the *Wheeler* case, and decided this case on its interpretation of a provision of law and the Treasury Department's regulatons thereunder, which were not before this Court in the *Wheeler* case.[3]

QUESTION PRESENTED

The sole question presented by the petition is whether the *final decision* of the Court below conflicts with the decision of this Court in *Commissioner v. Wheeler*, ... U.S. ....., (65 S. Ct. 799) decided March 26, 1945.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved are set forth in Appendix A to the petition, pp. 16-32.

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[3] The petition in the *Wheeler* case was not pending on September 20, 1940. It was filed with the Board of Tax Appeals on May 12, 1941 (Record No. 354; October Term, 1944; p. 1).

STATEMENT OF THE CASE

In the Introductory Statement, *supra*, pp. 2 to 6, we have called the Court's attention to the misleading statement on page 5 of the petition, respecting the action on this case by the Court below. With that correction we adopt the Statement of Facts set out in the petition (pp. 2-5), with the following added relevant facts which were omitted from the petition.

The distribution of January 31, 1934 to Fred J. Fisher was made pursuant to authority contained in a resolution of the Board of Directors of Senior Investment Corporation, adopted at a duly called special meeting of the Directors held on January 31, 1934, which authorized and directed the distribution and referred to it specifically as a capital distribution. This action of the Directors was approved and confirmed by the stockholders at the annual meeting held on May 8, 1934 (R. 15-16, 26-27). Fred J. Fisher and his wife in their joint income tax return for the year 1934 did not report as taxable income the value of the shares distributed to him on the ground that said distribution was a capital distribution to be applied against the cost or basis in the hands of Fred J. Fisher of the shares of Class A stock of Senor Investment Corporation, on which the distribution was made (R. 16).

REASONS FOR DENYING THE WRIT

(1) The Final Opinion of the Court Below Does Not Conflict with the Decision in the *Wheeler* Case, But Rests Upon the Lower Court's Interpretation of the Limitation Provision of Section 501 (c) of the Second Revenue Act of 1940 and the Treasury Regulations Issued Thereunder, Which Were Not in Issue in the *Wheeler* Case

As pointed out in the Introductory Statement, the final opinion of the Court below is not in conflict with the *Wheeler* decision, but expressly gave recognition to it. The original opinion of March 26, 1945, rendered on the same day as this Court's opinion in the *Wheeler* case, reached a different conclusion than did this Court as to the basis to be used under the Revenue Act of 1938 and prior Acts in computing earnings and profits available for dividend purposes. It also affirmed The Tax Court on the ground that Section 501 (c) of the Second Revenue Act of 1940 and the regulations issued thereunder required the use of corporate cost as a basis, because of the pendency of this proceeding before the Board of Tax Appeals on September 20, 1940.

In its action on the Petition for Rehearing the lower Court had for its guidance the decision of this Court in the *Wheeler* case. It therefore receded from its prior position respecting the validity of the earlier regulation, but considered further the question of whether its application might be affected by the limitation provision in Section 501 (c). In affirming The Tax Court on the rehearing the lower Court rested its decision entirely on the limitation provision of Section 501 (c) and Treasury Decision 5024 interpreting the same (Petition, Appendix

A, pp. 21-24. The limitation provision of Section 501 (c) and the regulations thereunder were not in issue in the *Wheeler* case, the petition in the *Wheeler* case having been filed with the Board of Tax Appeals in May, 1941. The fact that they were not in issue was brought out during the course of the oral argument of the *Wheeler* case in this Court. During the argument the following colloquy, which has been taken from a stenographic transcript thereof, occurred between Mr. Justice Jackson and Mr. Whitney, counsel for the Wheeler estate:

> "Justice Jackson: You have not told us whether you attach any importance to this tax liability if it is not applied to cases in litigation on September 20, 1940. I ask that, because your case appears to have been in controversy, but had not reached the litigation stage.
>
> "Mr. Whitney: Your Honor, I do not rely on that.
>
> "Justice Jackson: If we were of a disposition to disagree with you on that, would you then rely on that?
>
> "Mr. Whitney: No, your Honor. I think we have really covered the subject."

It is apparent, therefore, that the opinion of the Court below in this case is not in conflict with the *Wheeler* case, and, that being the sole basis on which the petition is grounded, it should be denied.

(2) No Other Grounds Are Alleged and There Are No Other Grounds Calling for a Review by This Court

No other grounds for granting the Writ, as set out in the rules of this Court, are alleged by the Commissioner nor, so far as we know, are there any such other grounds. No other Court of Appeals has had occasion to interpret the limitation provision of Section 501 (c) of the Second Revenue Act of 1940 and the regulations issued thereunder. The only other cases involving that provision decided by The Tax Court are *Falkland Corporation v. Commissioner* (T.C. Memo. Op.; C.C.H. Dec. 12,170-A) and *Senior Investment Corporation v. Commissioner*, 2 T.C. 124. In both cases The Tax Court reached the same conclusion on the meaning of the limitation provision of Section 501 (c) as was reached by the lower Court in this case. In *Falkland Corporation*, The Tax Court, viewing Section 501 (a) as clarifying legislation, said:

> "As to the effect of the Second Revenue Act of 1940: The respondent does not contend that the present case is expressly covered thereby, but merely argues that light is cast upon the law existing prior thereto, since the Ways and Means Committee Report indicates that the amendment set forth in section 501 (a) had the purpose of clarifying the law as to what constitutes earnings and profits of a corporation. But even if we assume that there was some intent to clarify the pre-existing law, we think it clear that no effect can be had upon the instant proceeding, for section 501 (c), although specifically providing that subsection (a) (in effect providing for the use of adjusted basis in determining earnings and profits under section 115) shall be effective as a part of prior revenue acts, goes on to provide specifically that

> nothing in such subsection 'shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States.' This is such case, and it would be clear error, we think, in the light of such statute, to hold that the statute of 1940 affects the tax situation of the present taxpayer."

The Commissioner appealed the *Falkland* case to the Circuit Court of Appeals for the Second Circuit, where it was disposed of on stipulation, without a decision on the merits. While the case of *Senior Investment Corporation* is now pending before the Circuit Court of Appeals for the Sixth Circuit, it is there on two issues, and the issue respecting the proper method for computing earnings and profits is a comparatively minor one.

We know of no other case pending which involves the application of the limitation provision of Section 501 (c) except that of *Senior Investment Corporation*. It seems apparent that since the limitation applies only to cases pending on September 20, 1940, or theretofore decided, there will be no other cases involving the question.

The discussion in the petition under the heading "Reasons for Granting the Writ" is confined almost entirely to an argument that the Court below erroneously interpreted the limitation provision of Section 501 (c) and the regulations issued thereunder. In the absence of a conflict between Circuit Courts this is not a ground for granting a Writ of Certiorari.

Although the petition states (p. 14) that "the Court below has so far departed from the usual course of ju-

dicial proceedings as to call for this Court's supervisory review," it is apparent that the only basis for this statement is the Commissioner's contention that the opinion below is in conflict with the opinion in the *Wheeler* case. We have already demonstrated that such is not the case.

(3) The Case Was Correctly Decided Below

During the consideration of this case the Commissioner has changed his position with respect to the meaning of the limitation clause in Section 501 (c). In his brief in the Circuit Court (pp. 25-26) he said that the only reasonable explanation of the limitation clause in that subsection "is that the exception was enacted because Congress, quite rightfully, did not believe that it would be proper for it to dictate to the Judiciary the manner in which the courts should decide controversies over which jurisdiction had already been taken or to interfere with decisions already reached. • • • • Because Congress refused to interfere with the jurisdiction of the courts to decide pending cases which, of course, includes their jurisdiction to err, it does not mean that Congress intended to direct or urge the courts to make a wrong decision." In the brief filed in the Court below we argued that this interpretation of the meaning of the limitation clause in effect amounted to Congressional sanction to decisions of The Tax Court or other lower United States Courts in all cases pending on September 20, 1940 or theretofore decided, regardless of the basis for determining earnings and profits approved by such decisions.

The Commissioner now seems to have abandoned that theory of the meaning of the limitation clause. In the

petition herein he interprets his regulations thereunder, and presumably the statutory provision itself, as merely providing that "if there should be an erroneous final decision in favor of a particular taxpayer in a case pending on September 6 (20), 1940, or already decided, the finality of the decision would be limited to the particular year involved and *res judicata* would not operate to give him (or other stockholders in the same corporation) a vested right in the wrong method of computing earnings and profits for all other taxable years" (Petition, p. 12).

Apparently the Commissioner would have this Court believe that Congress provided a general rule by legislation, and in the same subsection of the statute further provided that should any court refuse to follow that general rule such decision would not be *res judicata* for other years. It seems unnecessary to argue that Congress would not enact such legislation. We know of no instance where any legislative body has been guilty of such absurd legislative practice.

The Commissioner's theory is untenable. There was no need for Congress to deny to taxpayers with cases pending on September 20, 1940, or theretofore decided, in which there might be an erroneous *final* decision, the right to rely on such decision in cases involving other years. Had the limitation provision not been added, the cases pending on that date, and those theretofore decided (but not finally), would have been finally decided by the application of the rule set out in Section 501 (a). It would have been entirely unnecessary to add the second sentence of Section 501 (c), and this is so whether Section 501 is viewed as clarifying legislation or as new legislation. Moreover, the Commissioner's present theory is wholly illogical. If the purpose of Congress were, as

the Commissioner now states it, Congress certainly would not have made the limitation applicable only to cases pending on September 20, 1940, or theretofore decided, since there apparently was as much likelihood of "an erroneous final decision" in cases arising after September 20, 1940, or thereafter decided, as in cases pending on September 20, 1940, or theretofore decided.

The first sentence of Section 501 (c) reads as follows:

> "For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this Act shall be effective as if they were a part of each such Revenue Act on the date of its enactment."

However, Congress did not stop there but added a second sentence in the subsection, reading as follows:

> "Nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States."

The only meaning that can be given to subsection (c) of Section 501 is the following. The first sentence thereof makes the general rule of Section 501 (a), requiring the use of transferors' cost for determining earnings and profits, applicable to 1938 and all prior years. The limitation provision in the second sentence states an exception to the general rule, and makes it plain that the rule requiring the use of transferors' cost, found in Section 501 (a), is not to affect, or be applied in determining, the tax liability of a taxpayer for a particular year which on September 20, 1940 was pending before, or was

theretofore decided (but not finally), by the Board of Tax Appeals or any court of the United States. Congress thereby not only rejected the rule requiring use of transferors' cost in such cases, but as to them prescribed the use of corporate cost for determining earnings and profits.

The reason for the exception is plain. Congress was aware of the fact that the Board of Tax Appeals and the Federal Courts had uniformly held theretofore that the proper method for determining earnings and profits was by reference to corporate cost (H. R. Rept. 2894; 76th Cong.; 3rd Sess.; pp. 41, 42). In the light of that knowledge Congress was merely providing against the unfair and inequitable tax consequences which might otherwise result for those taxpayers who had consummated transactions in reliance on the uniform interpretation found in the earlier Board and Court decisions.

The Treasury Department's interpretation of Section 501 (c) is found in paragraph 2 of Treasury Decision 5024 (Petition, Appendix A, pp. 23-24). After stating in the first sentence that the rules requiring use of transferors' cost are applicable to all years prior to 1939, the paragraph provides as follows:

> "Although under section 501 (c) the final determination by the Board of Tax Appeals or any court of the United States of the tax liability of any taxpayer for any such taxable year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States, is not affected by the enactment of section 501, the rules stated in the regulations are applicable to such cases inasmuch as such rules are a proper interpretation of the law as it existed prior to the enactment of section 501. The limitation in section

> 501 (c) has application only to such taxpayer, and in the case of such taxpayer, only with respect to the tax liability for the specific year or years actually so pending on, or so determined prior to, September 20, 1940."

The above quoted regulation states and gives full effect to the exception found in the statute. The last sentence of it reaffirms the exception, but is further designed to prevent a decision required by the exception from being controlling in determining tax liability of the taxpayer for any other year. This is in accord with the interpretation given to the regulation by the Court below, and is the only reasonable interpretation that can be given it.

The limitation by the Treasury upon the retroactive effect of the rules for determining earnings and profits, as applied to the tax liability of particular taxpayers, is merely a recognition in the regulations of the plain meaning of the saving clause found in Section 501 (c). However, without the statutory saving clause, the limitation on retroactive effect set out in Treasury Decision 5024 is a valid exercise by the Commissioner and the Secretary of the discretion expressly given them by Section 3791 (b) of the Internal Revenue Code, which reads as follows:

> "(b) *Retroactivity of Regulations or Rulings.*—The Secretary, or the Commissioner, with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect.[4]

[4] See Paul's "Selected Studies in Federal Taxation," Second Series, pp. 76-103, for an exhaustive discussion of the legislative history of this provision and of the Congressional intent to do equity and fairness thereby.

We have here the unusual case where Congress did not leave to the Secretary or the Commissioner the discretion to apply general rules without retroactive effect. Instead, Congress set out the limitation expressly in the statute.

On pages 13 and 14 of the petition the Commissioner argues that the Court below rested its interpretation of Treasury Decision 5024 on the Commissioner's supposed desire to avoid retroactive application of Article 115-1 of Regulation 86. The Commissioner says at page 13:

> "It was suggested that, having first adopted the use of the transferors' basis in the regulation here applicable (Art. 115-1 of Treasury Regulation 86), and having promulgated the regulation after the beginning of the taxable year 1934, the Commissioner wished to avoid a retroactive application thereof."

In connection with this argument by the Commissioner we desire to point out, first, that Article 115-1 of Regulation 86, as stated in the opinion of the lower Court, was promulgated on February 11, 1935 (not just "after the beginning of the taxable year 1934"), and, second, that the language of the opinion there commented on by the Commissioner does not form the basis for the Court's conclusion. It merely sets out the equities which the Court found to exist on the facts of the particular case, namely, that the distribution was made on January 31, 1934, and Article 115-1 of Regulation 86 (being the first regulation on the subject) was promulgated on February 11, 1935. The basis of the lower Court's conclusion is concisely stated in the last sentence of its opinion, which reads:

"Since the decision (T.D. 5024) was made by the Commissioner with the approval of the Secretary of the Treasury, this limitation upon the retroactivity of the regulations has a double Congressional sanction, one arising from the saving clause in Sec. 501 (c), the other from the specific authority granted the Commisioner with approval of the Secretary, under Sec. 3791 (b) of the Internal Revenue Code, to limit the retroactive effect of any ruling, regulation or treasury decision relating to the internal revenue laws in precisely this way."

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

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October, 1945.

APPENDIX

Opinion Rendered on March 26, 1945, as Amended by Order of June 25, 1945

BEFORE HICKS, ALLEN AND MARTIN, CIRCUIT JUDGES

Allen, Circuit Judge. The principal question presented in this case is whether the taxpayer received in 1934 a taxable dividend paid out of earnings and profits of the Senior Investment Corporation. The Commissioner determined a deficiency of $1,231,636.92, based primarily upon a distribution by the Senior Investment Corporation in 1934 of 43,400 shares of common stock of General Motors Corporation. The Tax Court held that the Senior Investment Corporation had a large operating deficit on the date of the distribution of the shares, and that no taxable dividend was received.

The material facts as stipulated and found by The Tax Court are as follows:

The tax return involved was made for 1934 as a joint return by Fred J. Fisher and his wife, Burtha M. Fisher, residents of Detroit, Michigan. In January 1934, Fisher owned all of the outstanding Class A shares of the Senior Investment Corporation, 71,573 in number. The cost to him of these shares was not less than $1,723,881.25. On January 31, 1934, without surrendering any of the Class A shares Fisher received as a distribution on the stock 43,300 shares of General Motors common stock having a value of $1,723,881.25. The Senior Investment Corporation was incorporated July 29, 1929, with 300,000 shares

of no par value stock, consisting of 100,000 shares each of Class A, B, and C stock. Immediately following the incorporation the Fishers transferred certain assets, particularly securities, to the Senior Investment Corporation. The cost to the Fishers and the July 29, 1929, fair market value of the assets transferred and the number of shares issued to them therefor by the Senior Investment Corporation are shown in the following table:

	Cost	July 29, 1929 Fair Market Value	Number of Senior Shares Issued
Fred J. Fisher	$12,947,242.88	$42,943,427.76	71,573 Class A 79,805 Class C
	894,060.02	40,000,000.00	100,000 Class B
Burtha M. Fisher	699,350.00	5,486,250.00	9,143 Class A 10,195 Class C

The remaining 10,000 Class C shares were issued to an employee for no consideration. On December 9, 1931, the Senior Investment Corporation retired the 9,143 Class A shares held by Burtha M. Fisher.

In computing its gain or loss from the sale or other disposition of the assets received for its shares on incorporation the Senior Investment Corporation used as a basis the fair market value of such assets on the date received. As a result the corporation had a large operating deficit on January 31, 1934, when the General Motors Corporation shares were distributed to Fisher. The Commissioner used the transferors' costs as a basis, and thus computed, the books of the corporation showed a surplus in excess of $1,723,881.25 available for distribution of dividends. Since Fisher did not receive a taxable dividend unless the Senior Investment Corporation had a surplus available for distribution of dividends, the case turns upon the question whether the corporation, in computing its gain or loss on the sale of the assets acquired by it

from the Fishers in exchange for its own stock, should have used as a basis the fair market value of the assets at the time of the exchange, or the transferors' cost. The Tax Court, relying upon decisions of its own and of other courts (Cf. *Commissioner v. W. S. Farish & Co.*, 104 Fed. (2d) 833 (C.C.A. 5); *Commissioner v. F. J. Young Corp.*, 103 Fed. (2d) 137 (C.C.A. 3)), held that the basis used by the Senior Investment Corporation was correct and declined to sustain the deficiency.

The Commissioner contends that when a corporation acquires assets in a transaction where the transferors' gain or loss is not recognized for tax purposes, the corporation's earnings and profits for dividend purposes are determined in the same manner as its taxable gains. The transactions between the Fishers and the Senior Investment Corporation were tax free within §§ 112 of the Revenue Act of 1934.

The statute which governs this situation was first enacted in 1940 and its material portions are printed in

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* Second Revenue Act of 1940, c. 757, 54 Stat. 1004.

Sec. 501. EARNINGS AND PROFITS OF CORPORATIONS*—

(a) Under Internal Revenue Code. Section 115 of the Internal Revenue Code is amended by inserting at the end thereof the following new sub-sections:

"(1) Effect on Earnings and Profits of Gain or Loss and of receipt of Tax-Free Distributions. The gain or loss realized from the sale or other disposition (after February 28, 1913) of property by a corporation—

"(1) for the purpose of the computation of earnings and profits of the corporation, shall be determined, except as provided in paragraph (2), by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain, except that no regard shall be had to the value of the property as of March 1, 1913; but

the margin.* This section in effect provides that corporate earnings and profits on the sale of assets of the corporation are to be computed in the year when recognized in the same manner as taxable gains are calculated. But the statute also provides that the amendments made by the section shall not affect the tax liability of any transferor for any year which on September 20, 1940, was pending before or was theretofore determined by the Board of Tax Appeals or any court of the United States. The petition in this case was filed September 6, 1940, and therefore the proceeding is not governed by the amendments of 1940. In this respect the case is sharply differentiated from *Commissioner v. Wheeler, et al., Extrs.*, ... U.S. ....., decided March 26, 1945, which

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*"(2) for the purpose of the computation of earnings and profits of the corporation for any period beginning after February 28, 1913, shall be determined by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain."

Gain or loss so realized shall increase or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing net income under the law applicable to the year in which such sale or disposition was made. Where in determining the adjusted basis used in computing such realized gain or loss the adjustment to the basis differs from the adjustment proper for the purpose of determining earnings or profits, then the latter adjustment shall be used in determining the increase or decrease above provided. * * * * *

(b) Effective Date of Amendment. The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938.

(c) Under Prior Acts. For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this section shall be effective as if they were a part of each such Revenue Act on the date of its enactment. Nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals or any court of the United States.

held valid and applicable Treasury Regulations 101, Art. 115-3, embodying the provisions of the 1940 amendment as to the determination of earnings and profits of a corporation for dividend purposes. Relying upon the cited case, the Commissioner contends that Regulation 86, Art. 115-1, a predecessor of Art. 115-3, requires reversal of the decision of the Tax Court. We think that Art. 115-1 does not govern here, for Treasury Decision No. 5024, 1940-2, Cum. Bull. 110, declares that while the rules stated in the regulations are applicable to cases which were pending before the Board of Tax Appeals on September 20, 1940, the limitation of Sec. 501 (c) affects the tax liability for the specific year or years actually so pending on or determined prior to September 20, 1940. This decision applies the saving clause of Sec. 501 (c) to cases governed by Art. 115-1. As a contemporaneous interpretation of the meaning of the regulations by those who are appointed to carry out its provisions, Treasury Decision No. 5024 has great weight and is entitled to respect. *Augustus v. Commissioner*, 118 Fed. (2d) 38 (C.C.A. 6), certiorari denied, 313 U.S. 585. Cf. *Bowles, Admr. v. Seminole Rock & Sand Co.*, ... U.S. ....., decided June 4, 1945.

In view of the fact that the transaction involved took place on January 31, 1934, and Art. 115-1 was promulgated on February 11, 1935, Treasury Decision No. 5024 may be viewed as a limitation on its retroactive effect. Since the decision was made by the Commissioner with the approval of the Secretary of the Treasury, this limitation upon the retroactivity of the regulations has a double congressional sanction, one arising from the saving clause in Sec. 501 (c), the other from the specific author-

ity granted the Commissioner with the approval of the Secretary, under Sec. 3791 (b) of the Internal Revenue Code, to limit the retroactive effect of any ruling, regulation or treasury decision relating to the internal revenue laws in precisely this way.

The decision of The Tax Court is affirmed.